

COAL ENERGY, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-242

Decided August 19, 1988

Appeal from a decision of Administrative Law Judge Joseph E. McGuire denying an application for review and for temporary relief from Notice of Violation No. 85-092-081-003. Hearings Division Docket No. NX 5-119-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Bonds: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Performance Bond or Deposit: Generally

The Office of Surface Mining Reclamation and Enforcement properly issued a Notice of Violation for failure to comply with 30 CFR 942.800(b)(3) where an operator did not post an acceptable new bond within 30 days of the effective date of the federal program in Tennessee.

APPEARANCES: James Lowe, President, Coal Energy, Inc., Kingston, Tennessee, for appellant; R. Anthony Welch, Esq., Office of the Field Solicitor, U.S. Department of the Interior, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Coal Energy, Inc. (appellant), appeals from the December 23, 1985, decision of Administrative Law Judge Joseph E. McGuire denying an application for review and for temporary relief from Notice of Violation (NOV) No. 85-092-081-003 issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) for failure to post an acceptable bond for mine # 5 in Cumberland County, Tennessee, as required by 30 CFR 942.800(b)(3).

Before OSMRE became the regulatory authority under the Surface Mining Control and Reclamation Act of 1977 in the State of Tennessee (see 49 FR

38874, Oct. 1, 1984), the Division of Surface Mining and Reclamation of the Tennessee Department of Health and Environment issued DMS Bulletin # 35 dated August 7, 1984, entitled "Replacement of Performance Bonds." The bulletin read in part:

During the 1984 session of the Tennessee General Assembly, the Tennessee Coal Surface Mining Law of 1980 was repealed. As a result, the state program will be terminated effective September 30, 1984, and the federal government will assume jurisdiction over permits issued after May 3, 1978 (the effective date of Public Law 95-87).

In order to provide an orderly transition from the state program to the federal program, each operator who was issued a surface mining permit on or after May 3, 1978, will be required to submit to the Division an amended or replacement bond naming the United States and the State as co-payees. * * * If action is not taken by September 15, 1984, to amend or replace the appropriate bonds as indicated previously, DSM will request the U.S. Office of Surface Mining to inspect sites covered by such bonds.

The federal program regulation that went into effect on October 1, 1984, 30 CFR 942.800, provided in part:

(b)(1) The Office shall review the adequacy of bonds for those operators who posted reclamation bonds with the State of Tennessee under its permanent regulatory program prior to the effective date of this program, who gave the State collateral to guarantee reclamation, or who was [sic] required to take either of these actions.

(2) Where the Office determines that a bond amount is inadequate it shall notify the operator that additional bond is required. The operator shall post the required bond or collateral in the amount and within the time required by the Office. All bonds shall be made payable to "The United States or the State of Tennessee."

(3) Not later than 30 days after the effective date of this program each permanent program permittee shall either: (i) Post an acceptable new bond in the required amount made payable to "The United States or The State of Tennessee" or (ii) provide an executed assignment of the required acceptable bond made payable to "The United States or The State of Tennessee."

Because appellant's existing bond (Exh. R-2) did not name both the United States and the State of Tennessee and did not in other ways conform to the requirements for a bond under the federal program, OSMRE sent appellant a letter on February 25, 1985, indicating how the bond was deficient and requesting that a form containing all the required provisions be submitted within 30 days of receipt of the letter. See Exh. R-3. Appellant

informed OSMRE that it was attempting to obtain a new bond, but it was not able to do so. On June 3, 1985, OSMRE sent appellant a follow-up letter requiring the submission of the new bond within 15 days and stating that if it were not received an NOV would be issued. Because no bond was posted, OSMRE issued an NOV on July 10, 1985, citing 30 CFR 942.800(b)(3) as the regulation violated and requiring that a bond in an acceptable form be submitted by July 24. See Exh. R-1. Appellant filed an application for review and for temporary relief on July 22, 1985. The period for compliance stated in the NOV was subsequently extended to 90 days (Tr. 255), but appellant did not submit an acceptable bond until after that time (Tr. 256).

After a hearing on November 7, 1985, the Administrative Law Judge held that OSMRE presented a prima facie case that the NOV was properly issued and that appellant's evidence did not indicate that it had not been. He therefore denied the application for review and for temporary relief.

Appellant argues, as he did at the hearing, that small coal operators in Tennessee cannot obtain bonds and that therefore compliance with the requirement to post a new bond was beyond his control. 1/

[1] While we can sympathize with appellant's situation, we cannot afford him any relief. All surface coal mine operators in Tennessee were subjected to federal program requirements as a result of the repeal of the State surface mining law and regulations by the state legislature. See 30 U.S.C. § 1253(a), 1254 (1982); 30 CFR 733.12(g)(2)(i). Although the bonding requirements involved in this case may well have had a different impact on different operators, there is no provision for an exemption from these requirements and it does not appear that appellant sought to qualify for self-bonding under 30 CFR 800.23. Where the evidence is uncontroverted, as it is here, that appellant did not post an acceptable new bond within 30 days of the October 1, 1984, effective date of the federal program, an NOV issued for failure to comply with 30 CFR 942.800(b)(3) must be upheld.

1/ "We can not help that we have found it impossible to place bonds in the State of Tennessee. Also the amount of the bonds have more than doubled since the Federal [program] has taken over. This situation was created by others and not us." Notice of Appeal dated Jan. 6, 1986, at 1. "OSM has made it very difficult for the Small Coal Operator to survive. Along with OSM doubling and tripling the bonds, the insurance and bonding companies will not issue the operator in the State of Tennessee a bond without a 100% collateral or the coal company being a large producer." Reply dated July 18, 1986, at 1. "OSM has created a situation out there where there is no bond to be had, and they themselves created that, not the small operator" (Tr. 261-62). "In other words we had tried all efforts to get this bond, and to comply with what they wanted, but my feeling is that OSM created the situation where we couldn't comply legally with their requirements" (Tr. 277).

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Will A. Irwin
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge